No. 85-2067

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In The

# Supreme Court of the United States

October Term, 1986

UNITED STATES OF AMERICA,

*Petitioner,*

*v.*

JOSE MENDOZA-LOPEZ and
ANGEL LANDEROS-QUINONES,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

## BRIEF OF AMICUS CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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## BRIEF OF AMICUS CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

### STATEMENT OF INTEREST

The American Immigration Lawyers Association is a national organization of practicing lawyers and law school professors who practice and teach in the fields of immigration and nationality law. The Association has a direct and serious interest in the development of immigration and nationality law and in the case presently before the Court. The availability of the opportunity to raise the unlawfulness of the underlying deportation order as a defense to a criminal charge of reentry after deportation under § 276 of the Immigration and Nationality Act directly affects many of the Association's members and clients. The Association submits this brief in support of the position of re-

spondents. The focus of this brief is on the lack of procedural safeguards in deportation proceedings, a subject that is within the particular expertise of the Association and which complements the brief of respondents. All parties have consented to the filing of the brief.

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## I.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case squarely presents the issue left open in *United States v. Spector*, 343 U.S. 169, 172-73 (1952): Whether an alien in a criminal proceeding can collaterally attack the validity of the underlying deportation order where the prior deportation is an element of the offense. The petitioner's position, that the government may rely on an administrative finding to conclusively establish a criminal violation, raises significant questions regarding the level of due process which should be afforded to aliens and citizens alike in criminal proceedings. *See Spector*, 343 U.S. at 177 (Jackson, J., dissenting).

Deportation is a civil proceeding and thus the protections afforded to the criminal defendant are not available. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). The alien has limited fourth, fifth, and sixth amendment rights and the government must meet a lower standard of proof. *Id.* Although a deportation hearing must comport with fundamental fairness, the level of due process required is minimal.

Even this minimal level of due process is frequently violated in deportation proceedings. The immigration

courts face the pressure of a tremendous caseload. In deportation hearings, aliens are often denied their right to due process because of their own lack of understanding of the proceedings, the unavailability of counsel, and the pressures of representing themselves in mass hearings.

The use of a deportation order to conclusively determine a material element of a criminal offense denies fundamental fairness because the level of due process afforded in deportation hearings would never withstand scrutiny in a criminal setting. Contrary to the government's assertion, this case is not controlled by either *Lewis v. United States*, 445 U.S. 55 (1980), or *Yakus v. United States*, 321 U.S. 414 (1944). This Court should hold, as it did in *Estep v. United States*, 327 U.S. 114, 122 (1946), that it "... cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the [administrative decision] 'final' as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency."

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## II.

## ARGUMENT

In a criminal prosecution for reentry after deportation or exclusion in violation of § 276 of the Immigration and Nationality Act (hereinafter "the Act"), 8 U.S.C. § 1326 (1980), an essential element of the crime is that the alien has been previously deported or excluded. Petitioner's argument that the accused may not raise as a defense

the unlawfulness of the previous deportation or exclusion order presents the question whether a trial court may rely on an administrative finding of deportability to conclusively prove guilt in a criminal prosecution.

In *United States v. Spector*, 343 U.S. 169, 172-73 (1952), this Court expressly reserved decision on this issue because it had not been raised or briefed. Justice Jackson, however, discussed the importance of the issue in dissent:

> [W]e must not forget that, while the alien is not constitutionally protected against deportation by administrative process, he stands on an equal constitutional footing with the citizen when he is charged with crime. If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom.

*Spector*, 343 U.S. at 177-78 (Jackson, J., dissenting).

The circuit courts which have addressed the question of the ability to collaterally attack a deportation order in a § 276 proceeding are split on the issue. The Second, Fifth, and Tenth Circuits have taken the restrictive view that collateral attack is not required by statute or by the Constitution. *See United States v. Petrella*, 707 F.2d 64, 66 (2d Cir.), *cert. denied*, 464 U.S. 921 (1983); *United States v. Gonzalez-Parra*, 438 F.2d 694, 697-99 (5th Cir.), *cert. denied*, 402 U.S. 1010 (1971); *Arriaga-Ramirez v. United States*, 325 F.2d 857, 859 (10th Cir. 1963). On the

other hand, in addition to the Eighth Circuit in the case on review, the Third, Seventh, and Ninth Circuits have permitted varying degrees of collateral review of deportation orders. *See United States v. Nicholas-Armenta*, 763 F.2d 1089, 1090 (9th Cir. 1985) (allowing defendant to attack legality of deportation); *United States v. Rosal-Aguilar*, 652 F.2d 721, 723 (7th Cir. 1981) (affirming denial of de novo hearing on merits of deportation, but approving review insofar as the "Government must prove the underlying deportation to have been based on a valid legal predicate and obtained according to law"); *United States v. Bowles*, 331 F.2d 742, 750 (3d Cir. 1964) (allowing collateral attack on both factual and legal grounds).

We, as amicus curiae, urge this Court to adopt the view of the Eighth, Ninth, Seventh, and Third Circuits permitting collateral review of deportation proceedings. Permitting such review is a necessary safeguard to the due process rights of both aliens and citizens because the level of due process afforded to aliens in deportation proceedings is minimal, contrasting markedly with the panoply of safeguards provided for the criminal defendant, and because even this minimal level of due process is frequently violated in deportation proceedings. The use of an agency determination of deportability arrived at through procedures which would never survive scrutiny in the criminal context to conclusively establish a material element of a § 276 criminal offense violates the criminal defendant's right to due process of law.

### A. The Level of Due Process Afforded to Aliens in Deportation Proceedings is Minimal.

The courts have long held that a deportation proceeding is purely civil in nature and that therefore the procedures and safeguards associated with criminal prosecutions are inapplicable. *See INS v. Lopez-Mendoza,* 468 U.S. 1032, 1038 (1984); *Harisiades v. Shaughnessy,* 342 U.S. 580, 594 (1952); *Bilokumsky v. Tod,* 263 U.S. 149, 154 (1923), *overruled on other grounds, INS v. Lopez-Mendoza,* 468 U.S. 1032 (1984). In contrast to the full array of constitutional protections applicable to criminal prosecutions, deportation hearings are administrative proceedings which must only comply with the lesser standard of "fundamental fairness". *See Bridges v. Wixon,* 326 U.S. 135, 154 (1945); *The Japanese Immigrant Case,* 189 U.S. 86, 100 (1903).

At issue in this case is not whether the procedures provided in a deportation proceeding meet the standards of the due process clause of the fifth amendment to support a civil order of deportation, but rather whether those procedures are sufficient to establish a criminal conviction. The abbreviated administrative procedure for establishing deportability as described below contrasts sharply with the procedure mandated for criminal conviction. It is this absence of procedural safeguards in the deportation process that causes the deportation order to lack the certainty required to prove an element of a criminal conviction.

#### 1. The Lack of Pre-hearing Protections in Deportation Proceedings

From the moment that a person suspected of being an alien first encounters the Immigration and Naturaliza-

tion Service (hereinafter "INS"), he or she is subjected to a process that bears little resemblance to the strictly prescribed procedures for the criminally accused. At the time of arrest, suspected illegal aliens are not informed of their right to remain silent, that any information that they give to the INS will be used against them to prove deportability, nor of the right to be assisted by counsel. INS regulations require only that these warnings be given after INS agents have gathered sufficient information to begin deportation proceedings. 8 C.F.R. § 287.3 (1986). The courts have held that the procedures mandated by *Miranda v. Arizona,* 384 U.S. 436 (1966), are not required in deportation cases. *United States v. Alderte-Deras,* 743 F.2d 645, 647 (9th Cir. 1984); *Avila-Gallegos v. INS,* 525 F.2d 666, 667 (2d Cir. 1975).

Nor does the suspected illegal alien have the right to the presence of counsel during preliminary interrogation as is guaranteed in the criminal context by *Massiah v. United States,* 377 U.S. 201 (1964) and *Escobedo v. Illinois,* 378 U.S. 478 (1964). *See Lavoie v. INS,* 418 F.2d 732, 734 (9th Cir. 1969), cert. denied, 429 U.S. 1044 (1977). See also *Nai Cheng Chen v. INS,* 537 F.2d 566, 569 (1st Cir. 1976) (statement of alien admissible although INS refused to notify previously-retained counsel). The Act only requires that the alien be advised of his right to counsel at the actual deportation hearing. 8 U.S.C. § 1252(b)(2) (1980); *see also Castaneda-Delgado v. INS,* 525 F.2d 1295, 1298 (7th Cir. 1975).

Persons in INS custody awaiting a deportation hearing have no right under the eighth amendment to the Constitution to be released on bail. *Carlson v. Landon,* 342

U.S. 524 (1952). Nor does the sixth amendment right to a speedy trial apply to deportation proceedings. *Argiz v. U.S. Immigration Service*, 704 F.2d 384, 387 (7th Cir. 1983).

### 2. Lack of Procedural Safeguards in the Deportation Hearing

The finding of deportability is made in a civil, administrative hearing. Because it is civil instead of criminal, and because it is administrative instead of judicial, the hearing procedures bear no resemblance to a criminal trial, nor even to a civil action. The deportation hearing is conducted by a "special inquiry officer" or immigration judge, who is a member of the executive branch. 8 U.S.C. § 1252(b) (1980). There is no right to jury trial since the sixth amendment does not apply. The immigration judge is authorized by the Act to perform the multiple roles of prosecutor and adjudicator. 8 U.S.C. § 1252(b) (1980). This commingling of functions is an anomaly in administrative law, permitted to continue by Congress when it exempted the Immigration Act from the strictures of the Administrative Procedure Act, which the Court has held does not violate due process. *Marcello v. Bonds*, 349 U.S. 302, 309-10 (1955). In a criminal trial, on the other hand, the judge is required to be neutral and may not assume the role of prosecutor. *See, e.g., Petway v. United States*, 391 A.2d 798, 799 (D.C. App. 1978).

Further, although the regulations permit an immigration judge to withdraw if he or she deems himself or herself disqualified, 8 CFR § 242.8(b) (1986), the regulations do not prescribe any procedure for challenging the judge's qualifications or alleged bias before the deportation hearing. C. Gordon & E. Gordon, *Immigration Law*

*and Procedure* 5.7a (1986). This contrasts with the elaborate procedures for ensuring an impartial jury in criminal trials. *See, e.g., Akins v. Texas,* 325 U.S. 398, 403 (1945) (finding discriminatory jury selection process invalid); *Glasser v. United States,* 315 U.S. 60, 85-86 (1941) (selection of jury panel must be unbiased and indiscriminate).

Perhaps the most significant distinction from the point of view of the alien between deportation and criminal proceedings is the absence of a meaningful right to counsel in deportation proceedings. Indigent persons facing deportation have no right to counsel at government expense, unlike criminal defendants. *Compare Chlomos v. INS,* 516 F.2d 310, 314 (3d Cir. 1975); 8 U.S.C. § 1252(b) (1980) (alien must procure counsel at own expense); *with Gideon v. Wainwright,* 372 U.S. 335 (1963) (sixth amendment requires appointment of counsel at government expense for indigent criminal defendant). According to the Act, the assistance of counsel is not a right, but a "privilege". 8 U.S.C. § 1252(b) (1980). Thus, even where this "privilege" to be represented by counsel has been impaired, it has been held to be merely a "procedural omission" which does not violate the due process clause unless it can be shown to have been prejudicial. *Matter of Santos,* Interim Decision No. 2969 (BIA 1984). Even when counsel is retained, the alien does not have the right to "effective assistance" of counsel under the sixth amendment nor necessarily grounded in the fifth amendment guarantee of due process. *Mantell v. United States Department of Justice,* INS, 798 F.2d 124, 127 (5th Cir. 1986).

The applicable burden of proof also differentiates deportation from a criminal trial. The burden of proof in a deportation hearing is on the government to show alien-

age and deportability by "clear, unequivocal, and convincing evidence." *Woodby v. INS*, 385 U.S. 276, 286 (1966). This burden is considerably lighter than the "beyond a reasonable doubt" standard which the prosecution must meet in criminal cases. *See In re Winship*, 397 U.S. 358, 364 (1970) (due process clause requires proof beyond a reasonable doubt of "every fact necessary to constitute the crime charged"). Of even greater practical significance than the actual standard of proof for deportation is the shifting of the burden of proof to the alien in two important instances. First, if the lawfulness of the alien's entry is in question, once the Government establishes alienage (usually through an admission by the alien that he or she was born outside the United States), the alien has the burden of proof as to the time, place, and manner of entry, which raises a presumption of deportability if not met. 8 U.S.C. § 1361 (1980). Second, if the alien becomes institutionalized or a public charge within five years of entry, he or she bears the burden of showing that the underlying cause or condition did not exist at the time of entry. 8 U.S.C. § 1251(a)(3), (8) (1980).

The strict requirements of the fourth and fifth amendments in criminal trials likewise do not apply in deportation proceedings. In *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Court found that evidence seized in violation of the fourth amendment was admissible in a deportation hearing. The reach of the fifth amendment protection against self-incrimination is similarly circumscribed. Since the proceeding is not criminal the alien can be compelled to testify. *Bilokumsky*, 263 U.S. at 155. The alien enjoys no presumption of innocence, and therefore the immigration judge may draw an adverse inference

from the alien's silence, both as to incriminating and non-incriminating facts. *See Vajtaur v. Comm'r of Immigration,* 273 U.S. 103, 112 (1927); *Bilokumsky,* 263 U.S. at 154; *United States v. Alderete-Deras,* 743 F.2d 645, 647 (9th Cir. 1984).

There are no formal rules of evidence in deportation proceedings. The rules of evidence used by courts generally do not apply in deportation proceedings. *See Tisi v. Tod,* 264 U.S. 131, 133-34 (1924); *Shu Fuk Cheng v. INS,* 476 F.2d 1180, 1182 (8th Cir. 1973). According to the Act, the evidence adduced need only be "reasonable, substantial, and probative" to prove deportability. 8 U.S.C. § 1252(b) (1980). This definition permits the use of evidence that courts generally would find incompetent. Of particular note is the admissibility of hearsay to establish deportability. *See Martin-Mendoza v. INS,* 499 F.2d 918 (9th Cir. 1974); 8 C.F.R. § 242.14(c) (1986) (prior statements of alien and oral and written statements of any person made during an investigation are admissible).

The ability of the alien to defend against charges of deportability is further limited by the almost complete absence of formal discovery in deportation proceedings. Discovery is not provided for in the regulations. Attempts by the alien to gain discovery have been unsuccessful. *See, e.g., Marroquin-Manriquez v. INS,* 699 F.2d 129 (3d Cir.) *cert. denied* 456 U.S. 994 (1983) (upholding denial of request for letters rogatory and subpoena duces tecum); *Matter of Benitez,* Interim Decision No. 2979 (BIA 1984) (holding that the Federal Rules of Civil Procedures do not apply, and that there is no requirement that a request for discovery be honored); *Matter of Magana,* 17 I. & N. Dec.

111 (BIA 1979) (holding that the government is not required to respond to interrogatories). Limiting discovery to an examination of the government's evidence at the time of the hearing has been held to satisfy the requirement of due process. *Da Silva Pereira v. Murf*, 169 F. Supp. 81 (S.D.N.Y. 1958).

The form that most deportation hearings take would never be permitted in a criminal trial. For example, mass hearings in which multiple unrepresented aliens appear and are forced to plead simultaneously or in unison, as was done in the present case, have been held not violative of due process. *United States v. Nicholas-Armenta*, 763 F.2d 1089 (9th Cir. 1985). Nor is the immigration court required to provide simultantous translation to aliens who do not speak English. *See Matter of Exilus*, 18 I. & N. Dec. 276 (BIA 1982). Moreover, aliens have no right to have their deportation hearings held in any certain venue, unlike criminal proceedings. The courts have held that INS transfers of aliens for the purpose of instituting deportation proceedings to locations far distant from their homes and families, as the government also did in the present case, is within the discretion of the INS. *See Committee of Central American Refugees, et al. v. INS, et al.*, 795 F.2d 1434 (9th Cir. 1986); *Rios-Berrios v. INS*, 776 F.2d 859, 863 (1985); *Cf. Ledesma-Valdes v. Sava*, 604 F.Supp. 675 (S.D.N.Y. 1985) (transfers for exclusion hearings did not deprive aliens of right to representation). Even more surprisingly, the Act gives the immigration court the authority to enter an order of deportation in absentia. 8 U.S.C. § 1252(b) (1980). *See Patel v. INS*, 803 F.2d 804 (5th Cir. 1986); *Shah v. INS*, 788 F.2d 970 (4th Cir. 1986).

### 3. Lack of Post-Hearing Appellate Protections

The time granted to the alien to exercise his or her right to appeal an adverse decision by the immigration judge is extremely brief. If the alien does not waive his or her right to appeal at the deportation hearing, the regulations provide that the alien must file a notice of appeal within ten days of the oral decision of the immigration judge or, if the decision is served by mail, within thirteen days from the date it is mailed. 8 C.F.R. §242.21 (1986). Should the alien miss this brief opportunity to appeal, the deportation order becomes final and he or she is subject to immediate deportation. 8 C.F.R. §§ 243.1, 243.2 (1986). Until recently, the regulations required INS to give aliens who were not already in custody notice at least 72 hours before their deportation to provide them with an opportunity to close out their affairs. *See* 8 C.F.R. § 243.3 (1985). Since the INS has repealed the notice regulation, 51 Fed. Reg. 23041-23042 (June 25, 1986), an alien who affirmatively waives his or her right to appeal or fails to file a notice of appeal during the ten day period may be deported at once, without notice.

As the above examples demonstrate, the level of due process afforded aliens in deportation proceedings is minimal. The alien is not entitled to a jury trial, appointed counsel, or the full scope of fourth, fifth and sixth amendment rights. The government's burden of proving deportability is significantly lower than that needed to establish a criminal conviction and the lack of procedural safeguards as compared to a criminal trial handicaps the alien's ability to defend against a charge of deportability. These fundamental distinctions between the procedural protections of deportation proceedings and criminal trials

urge that due process would be violated if a deportation could be used to conclusively establish a material element of a criminal offense.

### B. Even the Minimal Standard of Due Process Required in Deportation Hearings is Frequently Violated.

Although aliens in deportation proceedings are afforded some due process protections, the tremendous and growing workload facing the immigration courts, the lack of available counsel, and the alien's inability to understand the procedures and thus to effectively exercise his or her rights lead to frequent violations of the alien's right to due process of law. The courts should permit a collateral review of a deportation order which the government seeks to use as the basis for a criminal conviction because aliens are often denied even the minimal standard of due process required in their deportation proceedings and because these violations often result in the alien's inability to exercise his or her right to seek review of the deportation decision.

The workload of the immigration courts is enormous and continues to grow. For example, in fiscal year 1982, 68,000 cases were filed in the federal immigration courts. In 1985, the number of cases almost doubled to 134,000. Girdner, *Inside the Immigration Court,* 6 Cal. Law., June 1986, at 64. INS and the immigration courts face a serious shortage of personnel to manage this burgeoning caseload. In the Los Angeles district, for example, at least 21,000 cases are currently pending but only nine government trial attorneys and seven immigration judges are available to handle them. *Id.* This workload and the lack of resources

has led the INS to emphasize the speedy processing of suspected deportable aliens, at the expense of a full adjudication in a deportation hearing where the alien is protected by at least some procedural safeguards.

The majority of apprehended aliens never get the opportunity to exercise their procedural rights in a deportation hearing because they accept the option of departing voluntarily, as provided by § 244(e) of the Act, 8 U.S.C. § 1254(e) (1980), thereby waiving their rights to counsel and to a hearing. In 1979, for example, 966,137 aliens chose voluntary departure, while only 25,888 were deported after a formal hearing. Developments in the Law, *Immigration Policy and the Rights of Aliens,* 96 Harv. L. Rev. 1286, 1390 (1983) [hereinafter *Rights of Aliens*]. A request for voluntary departure may be made and granted informally, either in the field or at an immigration processing or detention center by the Officer in Charge or Chief Patrol Agent. *See* Gordon & Rosenfield, 2 *Immigration Law and Procedure,* § 7.2d(1) (Rev. ed. 1986).

The methods used by INS officers to obtain the alien's acceptance of voluntary departure often violates the alien's right to due process of law. The usual practices of the INS used to persuade apprehended Salvadoran nationals to request voluntary departure have been preliminarily enjoined as violative of due process. *Orantes-Hernandez v. Smith,* 541 F.Supp. 351 (C.D. Cal. 1982). In *Orantes-Hernandez,* the court found a nationwide pattern of INS abuse in coercing Salvadorans to accept an unknowing waiver of their rights to a deportation hearing, to the assistance of counsel, and to apply for political asylum. *Id.*

These findings in the *Orantes-Hernandez* case are corroborated by a study conducted in 1983 of fifty-one aliens, forty-eight of whom chose voluntary departure. The study found that immigration officials did not explain to thirty of the aliens who chose voluntary departure the consequences of waiving their right to counsel and a hearing, or the available alternatives. Officials told eighteen about the right to appeal a deportation order to an immigration judge, but they actively discouraged the aliens from pursuing this. *See* Note, *Justice and the Undocumented Immigrant: Authority and Practices of the Immigration and Naturalization Service*, 19 Stan. J. Int'l L. 407, 424-25 (1983).

The atmosphere of fear and intimidation created by the INS has also been documented by the United States Commission on Civil Rights. *See* California Advisory Comm., U.S. Comm'n on Civil Rights, *A Study of Federal Immigration Policies and Practices in Southern California* (1980) [hereinafter *Immigration Policies Study*]. Witnesses testify in their study that aliens "are not apprised of their rights," *id.* at 35 (statement of Mark Rosenbaum of the American Civil Liberties Union in Los Angeles); "if a person insists on bail, insists on a hearing, insists on an attorney, he will be segregated and ridiculed," *id.* (statement of Robert Miller, a Los Angeles immigration attorney); and that "[w]hen a person is first detained, and is not processed yet . . . that person has no access to an attorney, even if an attorney wants to be there at the questioning of the detainee." *Id.* at 36 (statement of Ellen Lee, acting director, One-Stop Immigration Center).

Those aliens who despite INS discouragement and intimidation insist on their right to a deportation hearing often find that the hearing does not meet the promise of

due process of law. The foremost problem is that most aliens are unrepresented at deportation hearings. Although aliens have a statutory right to be represented by counsel at deportation hearings, in practice, attorneys are not available. Aliens in INS detention receive a list of free or low-priced agencies, but the services of these agencies are in high demand. Many do not accept collect calls or represent people in detention. Girdner, *supra*, at 64. And the lack of counsel, in many cases, deprives the alien of relief to which he is entitled. William R. Robie, Chief Immigration Judge of the United States, agrees that the shortage of legal counsel is a serious problem for the immigrants. *Id.; see also Immigration Policies Study, supra*, at 37 (noting that INS attorneys complain of the lack of counsel at deportation hearings). There is no doubt that representation has a dramatic effect on the outcome of deportation proceedings. *See Immigration Policies Study, supra* at 37-38 (reporting that in at least 70 percent of the cases in which counsel had appeared, the alien was still in the U.S. in some kind of legal status one year later); *see also id.* at 38 (statement of Immigration Judge Jay Segal that the assistance of counsel is extremely important in deportation hearings, especially when an alien is eligible for some relatively complex type of relief).

The increasing caseload has intensified the pressure on INS and the immigration courts to accelerate the processing of deportations. The "short-cuts" through the alien's due process rights to which INS may resort in such a situation is amply documented in *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982), *aff'ming Haitian Refugee Center v. Civiletti*, 503 F.Supp. 442 (S.D. Fla. 1980). The court there found that the INS' "Haitian

Program", designed to expedite the sizeable backlog of Haitian deportation cases, had violated the alien's rights to due process by scheduling mass hearings, interfering with their right to assistance of counsel by knowingly scheduling conflicting hearings, setting unattainable filing deadlines for political asylum applications, and failing to afford an opportunity for full presentation of individual cases. *Haitian Refugee Center*, 676 F.2d at 1040.

It might be hoped that the conditions created by INS in the Haitian Program were an extreme case, but the facts of the present case indicate that the actual procedural safeguards for unrepresented aliens in the more typical situation is only slightly better. Respondents Mendoza-Lopez and Landeros-Quinones were arrested in Nebraska, where they lived and worked. They were tranferred to Omaha, where they were initially processed, and then flown 500 miles to Denver, Colorado, where they were detained pending a deportation hearing. Memorandum Opinion of District Court attached at Appendix B to Petition for Certiorari (hereinafter "App.") at 8a-9a. Respondents' hearings were combined with those of eleven other suspected illegal aliens. None of the thirteen were represented by counsel. In fact, at least five of the thirteen aliens did not receive the list of free legal services until they appeared for their hearing. (App. 19a). At times all thirteen were questioned in unison, including the question whether they wished to have a continuance to attempt to find counsel to represent them (App. 19a-20a). Although both respondents expressed an interest in applying for suspension of deportation pursuant to § 244(a) of the Act, 8 U.S.C. § 1254(a) (1980), for which they appeared to be prima facie eligible, the immigration judge deported

them rather than providing them with an opportunity to apply (App. 21a-22a). They waived their right to appeal at the hearing (App. 23a), and were physically deported only eight days after they were apprehended (App. 9a).

The court below correctly held that the type of due process violation which occurred in the deportation proceeding in the case at bar could be reviewed in a later criminal prosecution for reentry after deportation. The court reasoned that because the respondents were eligible for suspension of deportation, the immigration judge's failure to adequately inform the respondents about this relief "materially affected" the result of the hearing. *United States v. Mendoza-Lopez*, 781 F.2d 111, 113 (8th Cir. 1985). The Eighth Circuit has thus adopted the rule that the alien must show prejudice to prevail on a claim that due process was violated at the underlying deportation hearing. *See United States v. Nicholas-Armenta*, 763 F.2d 1089 (9th Cir. 1985). Such a rule is necessary to permit the criminally accused to demonstrate that the deportation order was unlawful.

### C. Collateral Review of a Deportation Order Underlying a Criminal Prosecution for Reentry Should be Permitted Because the Direct Review Procedures May be Inadequate Where Due Process Was Violated.

The petitioner argues that permitting collateral review of the validity of a prior deportation in a criminal conviction for reentry after deportation is in some sense an "end run" around the system for review of deportation proceedings provided in the Act. Permitting the criminal defendant to attack the lawfulness of the underlying deportation order as an element of the crime does not en-

courage aliens to ignore the opportunity for administrative review but rather it may provide the only meaningful chance for review in many cases where due process has been violated.

The Act provides two remedies for unlawful deportation orders which, according to the Petitioner, should be deemed to be exclusive. The first, of course, is direct appellate review of the deportation order pursuant to section 106 of the Act. 8 U.S.C. § 1105a (1980). The second is a request for permission to reapply for admission after deportation found in 8 C.F.R. § 212.2 (1986). These remedies are illusory, however, for many aliens.

Section 106(a)(1) provides for judicial review of deportation orders in the circuit courts where the alien files a petition for review within six months of the final order. 8 U.S.C. § 1105a(a)(1) (1980). That right to review is lost, however, if the alien has not exhausted his or her administrative remedies or has left the country. § 106(c); 8 U.S.C. § 1105a(c). As discussed above, the alien has only ten or thirteen days in which to exercise his right to administrative review, after which the order becomes final and the alien is deportable. 8 C.F.R. § 242.21 (1986). Once the alien is deported, the opportunity for review is lost. Although, in some circuits, a deportation executed in violation of regulations will still be reviewable despite the alien having left the country, *see Zepeda-Melendez v. INS*, 741 F.2d 285 (9th Cir. 1984); *Juarez v. INS*, 732 F.2d 58, 59-60 (6th Cir. 1984), in actuality, few aliens deported in violation of regulations will be aware of this remedy or practically be able to effectuate it from a foreign country.

The right to seek direct administrative review is illusory when the due process violation results in an unknowing waiver of the right to appeal. In the present case, for example, the district court found it "inconceivable that they would so lightly waive their right to appeal, and thus to the relief they now claim entitlement, if they had been fully apprised of the ramifications of such a choice." (App. 23a). Or, to take a more extreme example, of what use is the right to seek administrative review if, after an alien exercised his or her right to appeal an adverse decision, he or she were to be physically deported in violation of law? By insisting on a strict interpretation of the review statute, the government would apparently not permit the criminal court trying a person charged with reentry after such an illegal deportation to raise this as a defense.

Requesting the Attorney General for permission to reapply for admission, the other remedy suggested by the government for persons unlawfully deported, is equally as illusory for many aliens. Permission to reapply is a discretionary remedy which acts as a waiver of the grounds of excludability found in §§ 212(a)(16) (alien who has been excluded from the country during the past year), and 212(a)(17) of the Act (alien who has been previously deported). 8 U.S.C. §§ 1182(a)(16), (17) (1980). Permission to reapply is sought only when the alien would otherwise qualify for admission (i.e., when a visa is available). *See Matter of Tin,* 14 I. & N. Dec. 371, 373 (Reg. Comm'r 1973). The factors to be weighed in deciding on a request for permission to reapply are traditional equity and hardship factors, such as presence of family in the United States. *Id.*

A request for permission to reapply for admission would not have offered any relief in the present case because neither respondent would have qualified for admission to the U.S. There is no evidence that they qualified for a visa. Instead, the type of relief for which they appeared eligible at their hearing, suspension of deportation, may only be requested by an alien who has not departed the United States within the preceding seven years. *See INS v. Phinpathya*, 104 S.Ct. 584 (1984). Because the respondents' deportation destroyed their only grounds for relief, permission to reapply for admission would not have been possible.*

### D. It is a Violation of Due Process to Use a Deportation Order to Conclusively Establish a Material Element of a Criminal Offense.

The requirement that the procedures satisfy some standard of due process of law applies to both deportation proceedings and to criminal trials. *See, e.g., The Japanese Immigrant Case*, 189 U.S. 86 (1903) (applying fifth amendment to deportation); *Rochin v. California*, 342 U.S. 165 (1952) (applying fourteenth amendment due process clause to state criminal trial). As this brief has described, however, the answer to "the question . . . what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), differs enormously between the two proceedings.

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* The recently-enacted Immigration Reform and Control Act of 1986 does not change this result. Even though 244(b)(3) has been added to the Immigration and Nationality Act in partial response to *Phinpathya*, it simply provides that an absence which is "brief, casual and innocent" will not meaningfully interrupt the continuous physical presence. The rule that a departure under an order of deportation or voluntary departure interrupts continuous physical presence has not been affected. *See Barragan-Sanchez v. Rosenberg*, 471 F.2d 758 (9th Cir. 1972)

The rationale for a higher level of procedural safeguards in criminal proceedings stems not only from the rights granted specifically to criminal defendants by the Constitution, such as the right to trial by jury or the sixth amendment right to assistance of counsel, but also from the higher level of procedures required in criminal proceedings by the Court's due process analysis. This Court has judged the constitutional adequacy of the procedures by balancing the competing private and governmental interests at stake in the proceeding. *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976). The factors to be weighed include: the strength of the private interest affected by the governmental action; the likelihood of governmental error through the procedures used; the probable value of additional procedural safeguards; and the governmental interest at stake. *Id.* at 335. This Court has recognized that due process is flexible and ". . . that not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey*, 408 U.S. at 481.

The Court has ruled that the interest of the alien facing deportation is not equivalent to that of the criminally accused. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). The Court's rationale for the relaxed procedural safeguards of the deportation proceeding has been that deportation is not punitive and that the constitutional protections for penal proceedings therefore do not apply. *Id.* To grant deportation orders preclusive effect in establishing criminal liability would appear to undermine the Court's expressed justification for the lower standard of due process.

The Court has recognized the conflict between the strict procedural safeguards guaranteed in a criminal trial

and the informal administrative process. In *Estep v. United States,* 327 U.S. 114 (1946), this Court held that in a criminal prosecution under Section 11 of the Selective Service Act the defendant must be permitted to raise as a defense the unlawfulness of the local induction board's action. *Id.* at 122-23. The Court noted that "[w]e are loath to believe that Congress reduced criminal trials under the Act to proceedings so barren of the customary safeguards which the law has designed for the protection of the accused." *Id.* at 122.

The government contends that *Estep* is inapposite because in that case Congress had made no provision for judicial review of the underlying administrative order. Brief for Petitioner, United States of America, at 21 n.16. As pointed out above, however, the right to appeal a deportation order is in many situations meaningless. Moreover, the availability of judicial review does not alter the underlying rationale that criminal defendants should be afforded a higher level of due process protection that mere reliance on an administrative order.

The absence of the safeguards of a criminal trial in the underlying element to be proved distinguishes this case from the decision in *Lewis v. United States,* 445 U.S. 55 (1980), in which a defendant in a prosecution for unlawful possession of firearms by a felon was barred from attacking the underlying felony conviction. 445 U.S. at 65. Lewis was convicted after a jury trial with the full spectrum of constitutional safeguards in force. In contrast, the alien is ordered deported after an administrative hearing accompanied by only minimal due process protections. Further, the convicted felon has a much more meaningful right

to appeal his or her conviction than does the deported alien. The criminal defendant has a first appeal as of right, and the indigent defendant is entitled to appointed counsel. *See Douglas v. California,* 372 U.S. 353 (1963). *Lewis* does not reach the issue in this case: whether the fundamental fairness required by the due process clause is violated when a court relies on an invalid administrative order to prove an element of a crime.

As the government contends, the Court came perilously close to endorsing that reasoning in *Yakus v. United States,* 321 U.S. 414 (1944), upholding the Emergency Price Control Act against a constitutional challenge. The Act provided that a person subject to a maximum price regulation could not attack its validity in a criminal prosecution for violating the regulation. 321 U.S. at 429-30. The Court justified this unprecedented incursion on the rights of the criminally accused by relying heavily upon exigencies of war-time inflation and the harm that would result from delayed or unequal price control. Even under these circumstances, this decision was roundly criticized. *See, e.g.,* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts,* 66 Harv. L. Rev. 1362, 1402 (1953); Note, *Judicial Review and the Price Control Act,* 24 Bos. U. L. Rev. 250 (1944). No such war-time exigencies justify the infringement of the rights of a person charged with reentry after deportation here urged by petitioner.

The defendant in a Section 1326 proceeding must, therefore, be allowed to collaterally attack the underlying deportation when it was entered in violation of law. Neither *Lewis* nor *Yakus* control the decision here because the first involved a prior judicial determination and the latter

the exigencies of wartime price control. As recognized by the Court in *Estep* and by the dissenters in *Spector*, permitting an element of a crime to be conclusively established in an administrative proceeding violates the criminal defendant's right to due process of law.

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## III.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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